No. 3086.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Edward H. Phelan,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

Petition of Plaintiff in Error for a Rehearing.

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STATEMENT.

Plaintiff in error was convicted in the lower court of failure to register for military service in accordance with an Act of Congress of May 18th, 1917, requiring all males over the age of twenty-one and not yet thirty-one on June 5th, 1917, to so register. Plaintiff in error appealed to this court, and on April the 1st, 1918, this court rendered an opinion affirming the judgment of the lower court. The offense with which plaintiff in error is charged is of such a grave and serious nature, involving, as it does, his loyalty to his country, that

we feel justified in saying that no graver charge, not excluding that of the taking of human life, could have been placed against him. The consequences of a conviction on such a charge as this, if finally sustained, will be to indelibly brand the plaintiff in error as a traitor to his country in her hour of need, to make him forever an outcast among his fellow-citizens, and to fasten this ignominious blot upon all near and dear to him and on his children and grandchildren yet unborn.

Plaintiff in error in good faith contends that he was born on March 13th, 1886, which would place him over the draft age on June 5th, 1917; that he honestly believed and does still believe that to be the fact and that by reason thereof he understood he was immune from registration, and had he felt otherwise he certainly would have registered. [Tr. p. 77.]

Plaintiff in error is not seeking to avoid his patriotic duty. Earnestly believing himself innocent of the crime charged, he seeks to remove the stain placed upon his good name by his conviction thereof and if successful in his endeavor he will forthwith gladly and ungrudgingly offer his services to his country and enlist. With that end in view and having in mind the extreme gravity of the charge against him, plaintiff in error respectfully requests this Honorable Court to examine again the record of his conviction, particularly with reference to those matters not adverted to in the opinion affirming the judgment, confident that a careful reconsideration of such record will move the court to grant this plaintiff in error the rehearing which he herewith respectfully requests.

Only Three Assigned Errors Discussed in Court's Opinion.

The transcript in this case discloses that there were no fewer than fifty-two assignments of error made; seventeen of these concern matter of the admission or rejection of evidence, and the balance concern the giving or refusal of instructions to the jury. These assignments were all made in good faith and a large number of them were treated at considerable length in the brief of plaintiff in error. Only three of these assignments are noticed by the court in its opinion affirming the judgment and these three deal with:

(a) The admission of certain testimony of Monsignor Harnett with reference to the baptism of the plaintiff in error and the doctrine of the Catholic church on the subject of infant baptism.

(b) The admission in evidence of copies of certain records of the pension bureau.

(c) Certain alleged misconduct of the district attorney during the trial.

The following alleged errors were not touched upon by the court in its opinion affirming the judgment, and in view of their importance and our firm belief that they are well taken and that each of them is of sufficient importance to in itself warrant the reversal of the judgment, we have thought perhaps they were not sufficiently called to the court's attention in the brief of plaintiff in error, and we accordingly set them forth here as briefly and succinctly as their importance will permit, and earnestly request the court's close consideration of them.

Assigned Errors Not Touched Upon in the Court's Opinion.

1. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENDANT TO SHOW THE EXISTENCE OF BIAS AND PREJUDICE AGAINST HIM ON THE PART OF THE WITNESS FRANK DAVEN.

2. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY MUST NOT PRESUME, CONJECTURE, GUESS, OR ARRIVE AT ANY CONCLUSION AS TO THE AGE OF THE PLAINTIFF IN ERROR FROM THE FACT THAT HE WAS BAPTIZED ON A CERTAIN DATE.

3. THE COURT ERRED IN ALLOWING TO BE INTRODUCED IN EVIDENCE AND READ TO THE JURY A CARBON COPY OF A TELEGRAM SENT BY THE UNITED STATES DISTRICT ATTORNEY TO THE ATTORNEY-GENERAL.

4. THE COURT ERRED IN ALLOWING TO BE INTRODUCED IN EVIDENCE AND READ TO THE JURY A LETTER FROM THE CHIEF OF THE DEPARTMENT OF JUSTICE AT WASHINGTON TO THE UNITED STATES ATTORNEY AT LOS ANGELES.

5. THERE WAS NO SHOWING ON THE TRIAL OF THIS ACTION THAT THE DEFENDANT WAS NOT AN OFFICER OR AN ENLISTED MAN OF THE REGULAR ARMY, OR THE NAVY, OR OF THE NATIONAL GUARD, OR OF THE NAVAL MILITIA, WHILE IN THE SERVICE OF THE UNITED STATES.

Each of the points above mentioned was assigned as error. We will now take these points up briefly, in the order in which they are set out.

I.

The Court Erred in Refusing to Allow the Defendant to Show the Existence of Bias and Prejudice Against Him on the Part of the Witness Frank Daven.

At the trial of this case one Frank Daven was called as a witness by the Government and testified that he knew the defendant and his mother; that he had worked on the same ranch as the defendant; that on the first Sunday in May, being the 6th of May, 1917, he had a conversation with the defendant on his ranch in regard to military service; that his wife and daughter were present at the time; that at that conversation the defendant said "that he did not want to get killed for France and England and then go to war, he let his whiskers grow and get away up in the mountains, up in Nevada some place, and the board could not find him." [Tr. pp. 61, 62.]

On cross-examination by counsel for the defendant, this witness was asked the following question:

"Q. Isn't it a fact that your wife became quite unfriendly to the defendant Phelan because of some advice that Mr. Phelan gave to you and some assistance he gave to you immediately following the departure of your wife from the ranch?" [Tr. p. 65.]

Again, the same witness was asked the following question:

"Q. Did your wife ever express to you any feeling of hostility regarding Edward Phelan because of some assistance that Edward Phelan rendered you following

the departure of your wife from the ranch?" [Tr. p. 66.]

Again, the same witness was asked:

"Q. About the time that you left the ranch, did you have any conversation with the defendant, Edward Phelan, respecting your wife and her departure?" [Tr. p. 66.]

And again, this question was put to the witness:

"Q. Did he (referring to the defendant) ever do anything to you to make you feel unkindly toward him?" [Tr. p. 67.]

To all of these questions an objection was sustained by the court on the ground that they either called for a conclusion of the witness or were hearsay or incompetent, irrelevant and immaterial. The refusal to permit these questions to be answered was assigned as error by the defendant. [Tr. pp. 165, 166.]

Again, when the defendant was testifying on his own behalf the following question was put to him by his counsel:

"Q. Mr. Phelan, with reference to the Davens, what, if anything, occurred near or about the first part of May in connection with Mrs. Daven and your relationship with Mrs. Daven in reference thereto?" [Tr. p. 80.] (Mrs. Daven had also been a witness for the Government.)

To which question an objection was sustained, on the ground that the same was incompetent, irrelevant

and immaterial. This ruling was assigned as error by the defendant. [Tr. pp. 166, 167.]

These questions were clearly designed to show bias and prejudice on the part of the witness Daven against the defendant Phelan, and it is elementary that a defendant in a criminal action is entitled to show such bias or prejudice.

Jones on Evidence (2nd Ed.), Sec. 828;
People v. Thompson, 92 Cal. 506;
People v. Worthington, 105 Cal. 166;
People v. Lee Ah Chuck, 66 Cal. 662;
People v. Webber, 26 Cal. App. 413;
Wigmore on Evidence, Vol. 2, Secs. 948-968.

"It is always competent to show that a witness is hostile to the party against whom he is called, that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile than that of an indifferent or friendly witness; hence it is always competent to show the relations which exist between the witness and the party against, as well as the one for whom, he is called. If the witness denies his hostility or bias, this may be proven by other witnesses. The cross-examination would be of little value if the witness could not be freely interrogated as to his motives, bias and interest, or as to his conduct as connected with the parties or the cause of action, and there would be little safety in judicial proceedings if an unscrupulous witness could conclude the adverse party by his statements denying his prejudice or interest in the controversy. * * * For the purpose of affecting the credibility of a witness he

> may be cross-examined * * * as to his state of feeling toward the respective parties. * * * It has frequently been held that it is error not to permit cross-examination as to the state of feeling or bias of the witness, but the extent of such cross-examination is within the sound discretion of the court; although it is the general practice to first interrogate the witness on cross-examination as to his feelings of bias or hostility, yet it is proper to prove the hostility of the witness by other competent witnesses who can swear to the fact."
>
> Jones on Evidence (2nd Ed.), Sec. 828.

The Supreme Court of California lays down the rule in this respect as follows:

> "It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interest involved, his hostility or friendship toward the parties, are always proper matters for investigation in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone."
>
> People v. Thompson, 92 Cal. 506 (509).

Again, in People v. Webber, *supra,* the District Court of Appeals of California, in holding that certain questions tending to show hostility should properly have been allowed on cross-examination, said:

> "It is elementary that the defendant was entitled to ask such question, and it was a matter of no little consequence to him to bring out the fact, if it were a fact, that the witness was biased and prejudiced against him in order that the jury, in weighing his testimony, might take that circumstance into consideration."
>
> People v. Webber, 26 Cal. App. 413 (416).

The rule is elementary and the authorities in the different jurisdictions are in accord with those above cited. In the case at bar there was testimony showing that Mrs. Daven, the wife of Frank Daven, had left the Phelan ranch, where she and her husband were employed, before her husband did. [Tr. p. 48.] The testimony of Frank Daven was undoubtedly very prejudicial to the defendant. Besides, there was a peculiar feature connected with his testimony, in that he placed the conversation had with the defendant, in which the defendant is alleged to have stated that he would go some place where "the board" could not find him, as occurring on the 6th day of May, 1917, some time before the Selective Service Law was passed, and before it was known that it would be passed, and before anyone surmised what machinery would be used in its operation. It was of vital importance to the defendant to show any reason there may have been for Daven entertaining a feeling of hostility towards him. If there had been some difficulty between the Davens and himself, which involved the conduct of Mrs. Daven, as intimated by the questions asked, it would be highly important that the jury should have this matter before them in passing upon the credibility to which Daven's

testimony was entitled and the weight that should be given to it. By the ruling of the trial court, this testimony was entirely excluded, not only on the cross-examination of Daven, but on the direct examination of the defendant himself. The ruling of the trial court in this respect was prejudicial error, sufficient in and of itself to warrant a reversal of the judgment.

II.

The Court Erred in Refusing to Instruct the Jury That They Must Not Presume, Conjecture, Guess or Arrive at Any Conclusion as to the Age of the Plaintiff in Error From the Fact That He Was Baptized on a Certain Date.

Plaintiff in error requested the court to instruct the jury as follows:

"You are instructed that you cannot presume, conjecture, guess or arrive at any conclusion as to the age of the defendant, Edward H. Phelan, from the mere fact that he was baptized on the 8th of August, 1886."

The court refused to give this instruction and plaintiff in error duly excepted to such refusal and such refusal is assigned by him as error. [Tr. p. 172, assignment No. 18.] In its opinion affirming the judgment this court, as we contend, erroneously, stated that the question involved in this case was whether or not plaintiff in error was born March 13, 1886, as he contended, or on July 13, 1886, as claimed by the Government. The real question was: *Did the plaintiff in error honestly believe he was born March 13, 1886, and acting on such honest belief fail to register,* or did

he wilfully fail and refuse to present himself for registration? Father Harnett, a witness for the Government, over the objection of plaintiff in error, testified that he baptized plaintiff on the 8th day of August, 1886. [Tr. p. 38.] There was no issue in the case as to when plaintiff in error was baptized and the utmost that the testimony of Father Harnett proved was that plaintiff in error was in existence on the date of his baptism, August 8, 1886. The Government's contention is that the plaintiff in error was not in existence until the 13th day of July, 1886. From the testimony of Father Harnett that he baptized the child on the 8th of August, the jury were asked to infer that the child could not have been born or have been in existence on the 13th of March, as was his contention. We submit that such evidence was far too remote to permit the jury to indulge in any such inference.

Jones on Evidence, Sec. 137;
U. S. v. Ross, 92 U. S. 281, 23 L. C. P. Co. 707;
First Natl. Bank v. Stewart, 114 U. S. 224, 29 L. C. P. Co. 101.

The date of baptism of the plaintiff in error was assuredly not a fact from which the date of his birth, which was one of the facts in issue, could be presumed or was logically inferable. Such facts only are admissble in evidence.

California Code of Civil Procedure, Sec. 1870, Sub. 15.

> "Although as a rule testimony should not be classed as irrelevant on the ground that it may have but little weight, yet the law requires an open and indisputable connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences."
>
> Jones on Evidence, Sec. 137.

In the case of U. S. v. Ross, *supra,* Ross was claiming the proceeds of a certain fund in the treasury of the United States alleged to have accrued there as a result of the sale of certain bales of cotton that had fallen into the hands of the United States Government during the Civil War, and the claim was made under an act dealing with such captured or abandoned property. The proof showed that the claimant in May, 1864, owned thirty-one bales of cotton then in a warehouse in Rome, Georgia; that on the 18th of that month Rome was captured by the United States forces and shortly afterwards the cotton was removed on Government wagons to a warehouse adjoining the road leading from Rome to Kingston, and connecting there with the road leading to Chattanooga. Whether this was the only cotton in that warehouse was not found, but it was fairly to be inferred from other facts that it was not. Subsequently all the cotton in that warehouse was shipped to Kingston by the military authorities. It was shown that a shipment of cotton arrived in Kingston from Rome August 19th, 1864, and was forwarded to Chattanooga; that on the 19th of August forty-two bales of cotton were received at Chattanooga from Kingston and from there were shipped to Nash-

ville, where they were turned over to the treasury agent and sold. The proceeds were turned over to the United States treasury. From these facts the court deduced as a presumption of law that the thirty-one bales recovered from the Government warehouse as stated were a part of the forty-two bales received from Nashville. In discussing the rightfulness of this presumption the Supreme Court of the United States said:

> "It is obvious that this presumption could have been made only by piling inference upon inference and presumption upon presumption. * * * These (referring to the inferences necessarily taken by the court in arriving at its conclusion) seem to us to be nothing more than conjectures. They are not logical inferences even to establish a fact, much less are they presumptions of law. They are inferences from inferences, presumptions resting upon the basis of another presumption. *Such a method of arriving at a conclusion of fact is generally, if not universally, inadmissible.* No inference of fact or of law is reliable, drawn from premises which are uncertain. * * * The law requires an open and indisputable connection between the principal and evidentiary facts and the deductions from them and does not permit a decision to be made on remote inferences. A presumption which the jury is to make is not a circumstance in proof and it is not therefore a legitimate foundation for a presumption."
>
> U. S. v. Ross, *supra.*

The above case was cited with approval in the Supreme Court of the United States in the case of First National Bank v. Stewart, *supra,* where the question

in issue was as to the payment or non-payment of a certain note, and evidence was offered as to the insolvency of the person claiming to have paid the same. The Supreme Court said:

> "The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely, whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and to leave some unpaid."
>
> First National Bank v. Stewart, *supra.*

The decisions of the Supreme Court of the United States above cited on what constitutes remote inference in matters of evidence were rendered in civil cases, and we submit that the rule there laid down should be applied with a great deal more care in criminal decisions, especially in those involving, as does the case we are considering, the most serious criminal offense with which any person could be charged, not excluding even that of murder.

Turning to the evidence in this case, it was sought to have the jury infer that July 13th, 1886, was the date of birth, from the date of the baptism of the plaintiff in error, from the fact that he was baptized by a Catholic priest and from the fact that that Catholic priest testified, over vigorous objections from the plaintiff in error, that the doctrine of the Catholic church as to infant baptism was that no child that is unbaptized and dies before it attains the use of reason can enter into the kingdom of heaven [Tr. p. 39], although there was not a particle of evidence showing

that that doctrine was known to the parents of the child either at the time of its birth or baptism or at any other time, or that the child's parents would not have permitted him to remain unbaptized for a longer period than twenty-five days after his birth, that is to say, the period of time elapsing from the 13th of July until the 8th of August. And it was further sought to have the jury conclude, and they unquestionably did conclude, that on account of the matters stated it was not possible that the plaintiff in error could have been born on the 13th of March and have been allowed to remain unbaptized from that time until the 8th of August, a period of four months and twenty-five days. With the Supreme Court of the United States in the Cook case, we say that such a presumption arrived at by the jury could only have been reached "by piling inference upon inference and presumption upon presumption," and, as said in the Stewart case, the evidence "was too weak and vague to contribute to an intelligent decision by the jury of the question in issue." As said by the Supreme Court in the Stewart case, "it is common for both solvent and insolvent men to pay some of their debts and leave some unpaid." It is also common for parents to baptize their children or have them baptized immediately after birth. It is equally common for them to postpone baptism for weeks and months and even years after birth, and when the fact is recalled that the plaintiff in error in this case was born over thirty years ago on a ranch which was then in a remote country district, no matter what the religious belief of the child's parents may have been,

whether they were Catholic or Protestant, it would have been not at all unusual to have postponed the ceremony of baptism for a period of four months, or even longer.

We submit that the jury should have been instructed as requested by the plaintiff in error, and that the refusal of the court to so instruct was prejudicial in the extreme, and in considering this point we respectfully request the court to also consider the matter which was discussed at some length in the brief of plaintiff in error and which is herein further adverted to, to-wit: the grave error, as we contend, of permitting Father Harnett to testify as to the doctrine of the Catholic church with reference to infant baptism and consequently early baptism, without also proving a knowledge of such doctrine on the part of the baptized child's parents. Proof of baptism alone would in this case merely prove the existence of Phelan on the date of baptism, to-wit: August 8, 1886. This last fact alone was wholly immaterial, because the Government contended for the previous existence of Phelan on July 13th, 1886, and Phelan himself claimed birth on March 13th, 1886. Obviously, no one questioned, but all admitted the existence of Phelan in August, 1886. Then to prove it was only to provide the jury with an unlawful and unjustifiable inference as to Phelan's birth in July.

III.

The Court Erred in Allowing to Be Introduced in Evidence and Read to the Jury a Carbon Copy of a Telegram Sent by the United States District Attorney to the Attorney General.

During the examination of Mrs. Mary Phelan, the mother of the defendant, as a witness on his behalf. and while the Government was endeavoring without success [Tr. pp. 113, 114] to prove the execution by Mrs. Phelan of certain affidavits in connection with applications alleged to have been made by her to the Government for a pension, and which affidavits and applications were introduced in evidence over the objection of the defendant as Government's Exhibits 3 and 4, the Government called out of order [Tr. p. 115] a witness, Clara Taylor. Miss Taylor testified that she was a clerk and stenographer in the office of the United States district attorney at Los Angeles; that she had partial custody of the filing of papers, and that she sent telegrams. She then identified a carbon copy of a telegram as one that she had sent from the office of the United States attorney. Thereupon, over the objection of defendant that the same was incompetent, irrelevant and immaterial, and no foundation laid, and that it was not the best evidence [Tr. p. 116], the carbon copy of this telegram was received in evidence and was read to the jury. The telegram in question is as follows:

"Los Angeles, Cal., 10/9/17.

"Attorney General, Washington, D. C.

"Send to special examiner Uline Los Angeles original papers *proving age and birth Edward Phelan* in pension application by Mary Phelan include any other evidence in pension files papers identified telegram October Ninth from Saltzgaber Trial October Sixteenth Rush

O'CONNOR, *U. S. Atty.*"

This evidence was introduced by the Government either as direct evidence of an essential fact in the case or to prove the existence or the execution of the pension affidavits mentioned or to show that the originals of these pension affidavits could not be produced, or to lay the foundation to impeach Mary Phelan.

From the wording of the telegram it will be at once seen how extremely harmful and prejudicial its admission was to the defendant. It unquestionably impressed the jury with the fact that the United States district attorney here and the attorney general in Washington considered and were of the opinion that the pension affidavits in question *proved the age and birth of Edward Phelan.* Now, if this telegram was introduced by the Government for the purpose of showing, either directly or indirectly, the date of Phelan's birth, it was pure hearsay, and hearsay of a kind most damaging and prejudicial to the defendant. It is elementary that written statements are equally objectionable as hearsay as oral statements.

> "Obviously statements in the form of letters are not more entitled to be received in evidence than mere verbal statements, and unless they are com-

petent as part of the *res gestae* or as admissions or under some other general rule of evidence, they should be rejected."

Jones on Evidence (2nd Ed.), Sec. 583.

This telegram was just as objectionable as the newspaper articles and telegrams introduced in evidence in the case of

Salo v. Duluth & I. R. R. Co., 140 N. W. 188,

in which case plaintiff was seeking to recover damages from the defendant railroad company alleged to have been sustained from a forest fire started by the railroad company, which had burned over plaintiff's property, and in an attempt to fix the date of the commencement of the fire, over objection, certain newspaper articles and certain telegrams sent by one of the defendant's train dispatchers to his superior officer, after having been shown to a witness to refresh his recollection as to the date, were admitted in evidence. In holding this was error, the Supreme Court of Minnesota said:

"We are unfamiliar with any rule rendering either of the newspaper articles competent to go to the jury under the circumstances disclosed. They were mere hearsay and should not have been admitted, and the same must be held with reference to the second telegram. The witness had no personal knowledge of the facts stated in this telegram and was merely reporting to the dispatcher what a section foreman told him. The transaction did not materially differ from such a communication by mail, and it could not be claimed that either the original letter or a copy thereof would be competent."

Salo v. Duluth & I. R. R. Co., 140 N. W. 188.

Letters written by third parties in another state to third parties in the state in which the prosecution is maintained, but not in answer to letters written by the accused nor connected therewith, are not admissible in evidence against the accused to prove a material fact in the case.

Bedford v. Sate, 55 N. W. 263.

In the case last cited, the charge against the defendant was that of unlawfully, willfully and maliciously attempting to corrupt a material and important witness for the prosecution in a criminal case then pending. To quote from the opinion:

> "A letter from the wife of plaintiff in error to the wife of Hezekiah Bedford, and also from the daughter to her mother, were offered and introduced in evidence against the objection of plaintiff in error. These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know."

At the risk of repetition we again desire to respectfully call to the court's attention the extremely damaging statement contained in this telegram over the signature of the United States district attorney, addressed to the attorney general, to-wit, that the papers that he referred to *proved the age and birth of the defendant and plaintiff in error, Edward Phelan.* If such testimony as this were admissible, the Government might go a short step further, and with the same right introduce in evidence copies of all letters and

reports passing between the district attorney's office in Los Angeles and his superior officer, the attorney general, in Washington, discussing the case at bar and the likelihood or need of obtaining a conviction, and the evidence that the Government had against the defendant, and the views of the United States district attorney and the attorney general in connection with such evidence.

The situation is similar to that obtaining in the case of Cook v. U. S., 34 L. Ed. 906, in which the plaintiff in error was convicted of murder, and an appeal was taken to the Supreme Court of the United States, and it developed that at the trial a witness who had formerly been attorney general of the state of Kansas, and who in that capacity had made a report to the governor of the state touching the death of the person for whose murder the defendant Cook was on trial, was called in rebuttal as a witness for the prosecution, and over objections of the defendant certain portions of this report, containing certain statements alleged to have been made by the defendants, were admitted in evidence and read to the jury. The court instructed the jury that the portions of the report were admitted in evidence to be considered by them as to whether or not such statements had been made to the witness, who now denied that they had been. The Supreme Court concluded their opinion in the case as follows:

> "The jury were thus informed that this report, although merely hearsay, was substantive evidence upon the issue as to whether the defendants were present at and participated in the killing. The rep-

> resentatives of the Government in this court frankly conceded, as it was their duty to do, *that this action of the court below was so erroneous as to entitle the defendants to a reversal.*"
>
> Cook v. U. S., *supra.*

We submit that, in the case at bar, likewise, under the most elementary principles of law, which need no citation of authorities for their support, the introduction of the telegram in question was error of such a prejudicial nature as to entitle plaintiff in error to a reversal of the judgment.

If this telegram was introduced by the Government for the purpose of supplying a foundation for the introduction of the pension affidavits, being Government's Exhibits 3 and 4, for the introduction of which the Government wholly without success endeavored to lay a foundation [Tr. pp. 113, 114, 96, 97], a mere perusal of the document shows conclusively, as outlined in the brief of plaintiff in error, pages 77 to 80, that it neither proved the existence or the execution of the pension affidavits in question, nor did it in any manner tend to show that the originals of these pension affidavits could not be produced.

If the document was introduced by the Government for the purpose of endeavoring to lay a foundation for the impeachment of the witness Mary Phelan, it wholly failed to serve such purpose, because it did not or could not, of its very nature, in any manner supply the Government's omission to relate to Mrs. Phelan the statements alleged to have been made to her which it was sought to impeach, or the time and place of the making

thereof, or to ask her whether or not she had made such statements; nor could the document in question in any manner supply the omission of the government to show Mrs. Phelan the original writing claimed to have been made by her, and concerning which it was sought to impeach her. As shown in brief of plaintiff in error, pages 76, 77, by the authorities there cited, such a foundation of necessity must have been laid in order to impeach the witness in question.

IV.

The Court Erred in Allowing to Be Introduced in Evidence and Read to the Jury a Letter From the Chief of the Department of Justice at Washington to the United States Attorney at Los Angeles.

Immediately after the introduction in evidence by the Government of the telegram hereinabove discussed, and while the same witness, Clara Taylor, was on the stand, over the objection of the defendant that the same was incompetent, irrelevant and immaterial [Tr. p. 118], the government introduced in evidence a letter from A. B. Bielaski, chief of the department of justice at Washington, to John R. O'Connor, United States attorney at Los Angeles, California. The letter was in words and figures as follows:

"Department of Justice, RLD-LP
Bureau of Investigation,
Washington, October 10, 1917.

"John R. O'Connor, Esquire, Assistant United States Attorney, Los Angeles, California.

"Dear Sir:

"Referring to your telegram to me of today, I enclose herewith copy of the baptismal and death records of the Cathedral of St. Vibiana, relative to the baptism of Edward Henry Phelan, copy of a deposition made by Mary Phelan on November 10, 1909, in connection with her claim for pension as widow of Thomas Phelan, and copy of three applications for pension made October 12, 1889, August 15, 1890, and May 12, 1908, by Mary Phelan, certified under the act of August 24, 1912, 37 Statutes at Large, page 498, section 3.

"The Commissioner of Pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well.

Very truly yours,
A. B. Bielaski,
Chief."

(Enclosures) RLD"

The same remarks are applicable to the introduction of this letter as have been made in connection with the telegram from the United States attorney to the attorney general, hereinabove discussed and referred to. This letter was presumably admitted in evidence as being an answer to the said telegram. The letter contained a statement by

the chief of the department of justice as to what the commissioner of pensions *considered* with reference to the sending to Los Angeles of certain original papers. The statement in question was: "The commissioner of pensions considered it impracticable to send the original papers. I believe, however, that the certified copies will serve your purpose equally well." Even had the commissioner of pensions himself undertaken to testify that he considered it impracticable to send such original papers, that would have been nothing more than his conclusion, and would have been incompetent for that purpose. As it was, we have here admitted in evidence a written statement by a third person of what the commissioner of pensions said to him he considered about the sending of these papers. This is unquestionably the purest hearsay.

Furthermore, as was said with reference to the telegram to which this letter was an answer, the letter does not in any way help to prove the existence or execution of the pension applications and affidavits referred to therein, nor does it supply any competent reason why the originals of these documents were not produced by the Government. The Bielaski letter contained this further damaging statement with reference to the documents enclosed: "I believe, however, that the certified copies will serve your purpose equally well."

We must respectfully urge and submit that the telegram from the United States attorney in Los Angeles to the attorney general, taken together with the letter from Bielaski in reply thereto, were necessarily bound to impress the jury, and did without a doubt impress

the jury with the conviction that the pension affidavits in question not only were properly executed in every way and that they had been executed by Mary Phelan, but that they were competent evidence and did actually prove the age and birth of the defendant and plaintiff in error, Phelan, and for these reasons were dangerously damaging and prejudicial to the plaintiff in error, and that their introduction by the Government was inexcusable on any theory and constitutes reversible error. The admission of both of these documents was assigned as error [Tr. pp. 170, 171, 172.]

V.

There Was No Showing on the Trial of This Action That the Defendant Was Not an Officer or an Enlisted Man of the Regular Army or the Navy or of the National Guard or of the Naval Militia While in the Service of the United States.

The indictment in this case, after charging the plaintiff was of the draft age on the date of registration prescribed by the Selective Service Act, and that he failed to register on that day, proceeds as follows:

"He, the said Edward H. Phelan, then and there not being an officer or an enlisted man in the regular army or the navy or the marine corps or the national guard or the naval militia in the service of the United States, or an officer in the reserve corps or an enlisted man in the enlisted reserve corps in active service." [Tr. p. 7.]

It was necessary for the sufficiency of the indictment to bring the plaintiff in error within the above-quoted

provision, which is contained in section 5 of the Selective Service Law of May 18th, 1917. The indictment would not have charged an offense had it not negatived the exception quoted. It was incumbent upon the Government to prove as well as plead that the plaintiff in error was not in the excepted class. This was a material portion of the crime charged and should have been proved.

Shelp v. United States, 81 Fed. Rep. 694;
Johnson v. People (Colo.), 108 Am. Stat. Rep. 90;
State v. Booknight, 74 Am. Stat. Rep. 751;
State v. Abbey (Vt.), 67 Am. Dec. 654;
United States v. Cook, 21 L. Ed. 538;
People v. Miles, 9 Cal. App. 312;
2 Bishop's New Crim. Pr. (2nd Ed.), Sec. 636, 637, 639.

The correct doctrine with reference to pleading and proof of an exception in a criminal statute is contained in the case of State v. Abbey, *supra:*

> "In saying that an exception must be negatived when made in the enacting clause, reference is not made to sections of the statute, as they are divided in the act; nor is it meant that, because the exceptions are contained in the section containing the enactment, it must for that reason be negatived. * * * The question is, whether the exception is so incorporated with, and becomes a part of, the enactment as to constitute a part of the definition or description of the offense. * * * 'It is the nature of the exception, and not its location,' which determines the question. * * * The same principle

> should govern this class of cases which governs other classes, and the exceptions should be negatived only where they are descriptive of the offense. or define it; but where they afford matter of excuse merely, they are to be relied upon in defense. The question is one not only of pleading, but of evidence, and where the exceptions must be negatived in the indictment, the allegations must be proved by the prosecution, though the proof may involve a negative."

This doctrine is approved by the Supreme Court of the United States in the case of United States v. Cook, *supra*.

The question, then, is whether the provisions of the Selective Service Law providing that any person who was an officer or an enlisted man in the regular army or the navy, etc., need not register, is so incorporated with and such a vital part of the statute requiring registration as to form a part thereof. We submit that this question is not open to argument. The Selective Service Law specifies a certain portion of the male population of the United States that shall on a certain day present themselves for registration, and that part of the population of the United States that is already in the military or naval service of the United States is, by express enactment, excepted from the registration provisions. It seems clear that had the indictment failed to charge that the plaintiff in error was not in the military or naval service of the United States, it would have failed to state a public offense. If it was necessary to allege this in the indictment it was vitally necessary to prove that fact at the trial.

There is not a syllable of testimony in the records on that point. This is assigned as error [Tr. p. 185].

Points Discussed in Opinion.

The points above discussed are matters which, as heretofore stated, were not touched upon at all in this court's opinion affirming the judgment. There are two other alleged errors, however, which are partially touched upon in the opinion, but the real vice of which was not apparently in the mind of the court. The points referred to are:

A. The error in admitting in evidence copies of pension applications and affidavits alleged to have been made by Mary Phelan.

B. The error in permitting Monsignor Harnett to testify as to the baptism of the plaintiff in error and the doctrine of the Catholic church as to infant baptism.

As to the first of these points the opinion of the court holds that these pension applications were properly admitted under certain sections of the federal statutes which deal only with the *certification and authentication* of these documents and not with *the proof of their existence or execution.* It was the total failure of the Government to show *the existence or execution* of these instruments that constituted the most vital error in their admission in evidence.

As to the testimony of Monsignor Harnett, this court in its opinion remarks that it tended to sustain the Government's contention. No mention is made of the fact that *there is no showing of knowledge of the doc-*

trine of the Catholic church as to infant baptism on the part of the parents of the plaintiff in error. The failure to make such a showing rendered the admission of this testimony grave error.

We will deal briefly with each of these points.

A.

There Was No Proof at All of the Existence or Execution of the Pension Applications and Affidavits Alleged to Have Been Made by Mary Phelan Which Were Introduced in Evidence as Government's Exhibits Nos. 3 and 4.

Plaintiff in error's assignment of errors Nos. 16 and 17, appearing in the transcript at pages 170 and 172, set out that the court erred in admitting in evidence over his objection United States Exhibits Nos. 3 and 4. Exhibit No. 3 was the deposition or affidavit of one Mary Phelan taken in connection with an application by said Mary Phelan for a pension, and this affidavit contains a statement as to the name and date of birth of an Eddie Henry Phelan and an Eddie Phelan, which agrees with the date of birth claimed for defendant and plaintiff in error by the Government. Exhibit No. 4 consists of affidavits made by one Mary Phelan in connection with three separate applications for a pension, which affidavits also contain a statement as to the date of birth of a son, Eddie Henry and Eddie, which agrees with the date claimed by the Government.

The brief of plaintiff in error (pages 62 and 77) dwelt at some length on the error in the introduction

of these affidavits, and besides contending that the existence and execution of them had not been proved (brief of plaintiff in error, pages 62, 65, 66), also made other contentions concerning the production of the certified copy of the record concerning these affidavits, claiming that the same had not been produced from the proper custody and that they did not bear the seal of the department of justice, and that their introduction did not in any way lay the necessary foundation for the impeachment of the witness Mary Phelan. In its opinion affirming the judgment this court states: "The objections to the introduction in evidence of the certified copies of the record of the pension bureau are sufficiently answered by the provisions of the statutes of the United States (Fed. Ann. Vol. 3, Sec. 882, p. 26, Fed. Ann. Supp. 1914, Sec. 1, 3, 4, p. 498)." The sections of the statutes referred to deal only with the certification and authentication of the documents in question and with their rank as evidence, that is to say, whether or not they are to be considered as primary or secondary evidence. Evidently, then, the most vital error in the introduction of these documents was not in the mind of the court at the time the opinion was rendered, and in view of the extreme seriousness of the charge against the plaintiff in error here, as hereinabove noted, we respectfully submit that

There Was No Proof at All of the Existence or Execution of These Pension Affidavits and Applications by the Witness Mary Phelan, to Justify Their Admission in Evidence to Impeach Her.

The only proof that was made or attempted to be made by the Government prior to the introduction of these documents was that the documents, alleged to be photographic copies of the originals, were shown to the witness Mary Phelan, and the witness was closely questioned several times by counsel for the Government and also by the court [Tr. pp. 96 and 97] as to whether or not the signature on the photographic copy was her signature, to which question, repeated several times in different forms, the witness, very naturally, in view of the fact that it was a purported photographic copy that was exhibited to her, stated that while it looked like her signature she could not say; that she did not know whether it was or not [Tr. p. 97]. The same method of proof, with the same results, was adopted by the Government in an endeavor to prove the execution and existence of the second set of affidavits, being Government Exhibit No. 4 [Tr. p. 114]. We particularly call the court's attention to what transpired when Exhibit No. 4 was shown to Mrs. Phelan, and the Government's attorney undertook to examine her concerning the same. Mrs. Phelan was shown Exhibit No. 4, the first page thereof, containing entries of births, and asked if it was not in her handwriting, to which she replied that she did not know, she could not say, that she did not remember writing that, and after several questions

along the same line counsel for plaintiff in error interposed an objection and the court said:

"I think, Mr. Lawson (counsel for Government), you will have to show me some authorities on the subject. You can ask her if she made certain statements in that document."

"Q. By Mr. Lawson: I ask you again, Mrs. Phelan, if that is not your handwriting.

A. I don't remember. I can't say.

* * * The Court: Well, you may ask her if it is a photographic copy of her handwriting.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I don't remember.

* * * Q. By Mr. Lawson: Is that your handwriting?

A. I don't remember. I could not remember whether I wrote it.

The Court: That was not the question I gave you leave to ask.

Q. By Mr. Lawson: Is that a photographic copy of your handwriting?

A. I can't remember." [Tr. p. 114.]

Thereupon, as the record shows [Tr. p. 115], there was a discussion between court and counsel as to admissibility of evidence, and a short recess was taken. When the court reconvened and the jury resumed their places Mrs. Phelan was not recalled to the witness stand by the Government, but instead the Government called a stenographer in the office of the United States at-

torney, Clara Taylor, and through her introduced a carbon copy of a telegram from the United States attorney to the attorney general in Washington, D. C., asking that papers be sent him "*proving age and birth Edward Phelan,*" and a letter from the chief of the department of justice in reply thereto. There was not another scrap of evidence introduced tending in any way to prove the existence and execution by the witness Mary Phelan of the documents in question.

We particularly desire to call the court's attention to the fact that for the purpose of this argument we are assuming, without admitting it, that these photographic copies of the pension affidavits were *original evidence,* and we are not discussing any question now of any showing that should have been made to justify the introduction of secondary evidence; nevertheless, treating these documents as original evidence, there is not one syllable in the record to prove that these pension affidavits and applications ever existed or were ever executed by the witness Mary Phelan. The writings in question should have been proved in the same manner as any other written instrument. There was no evidence here given that the witness Mary Phelan had ever admitted the execution of these documents nor was her handwriting on the documents identified or proved in any manner, nor were the documents proved by anyone who saw the writing executed or by evidence of the genuineness of the handwriting or by a subscribing witness, as provided in California Code of Civil Procedure, Sec. 1940. The documents were not such as in any manner proved themselves. It is true

that section 1948 of the Code of Civil Procedure of the state of California provides that a writing acknowledged in the manner provided for the acknowledgment of a conveyance of real property is *prima facie* evidence of its execution. There is no acknowledgment whatever on these documents. The instruments are verified, but not acknowledged. Surely these photographic copies cannot have been entitled to be admitted in evidence under any other or different or less stringent rule than would have the original documents themselves had they been offered in court, and it certainly will not be contended that upon the mere production of the original documents, without a syllable of proof showing their identity, existence or execution, they could have been properly or at all admitted in evidence. The trial court by its suggestion to the attorney for the Government, during the examination of witness Mary Phelan, above set out, pointed the way to the proper method of proving these instruments; and that the Government itself recognized that no proof of them had been made is, we submit, shown by the fact of their calling the witness Clara Taylor and through her introducing, erroneously, as we contend, and as is herein set out, copies of a telegram and letter in reply thereto, dealing with the sending of the copies in question to the United States attorney at Los Angeles. Both of these exhibits contained a statement that one Eddie Henry or Eddie Phelan was born on July 13, 1886, the date contended for by the Government as the date of birth of plaintiff in error, and their admission was extremely damaging to him.

B.

The Vital Objection to Deducing Any Conclusions From the Testimony of Monsignor Harnett as to the Doctrine of the Catholic Church With Respect to Infant Baptism Is That the Parents of the Plaintiff in Error Were Not Shown to Have Had Knowledge of Such Doctrine, and Therefore to Draw Any Inferences From the Monsignor's Statement of It Would Be Pure Speculation.

It would appear from the opinion that the Circuit Court attached some importance to the statement of Monsignor Harnett as to the spiritual salvation of infants not baptized, and that it contributed to substantiating the Government's contention that the true date of the birth of plaintiff in error was July 13th, 1886. It is submitted, however, that this testimony should have no effect whatever, in view of the fact that nowhere in the evidence is it shown that either of the parents of the plaintiff in error, and particularly his mother, had any knowledge whatsoever of the doctrine of the Catholic church and its corollary, the prompt baptism of infants, and we are inclined to believe that respecting this matter the Circuit Court has not noticed our objection, as set forth in specification of error Nos. I and II. [Tr. pp. 158-160.]

The only attempt made to ascertain whether or not the practice was known to the parents was the question put by the United States attorney to the Monsignor: "Q. Was there a practice in your church that was known to those parents concerning when the child

should be baptized?" [Tr. p. 39.] And to this, upon exception overruled, the answer was, frankly: "I don't know." Absolutely no question whatever respecting this point was put to Mrs. Phelan.

It is difficult to see what bearing the doctrine of infant baptism could have on any of the issues involved, unless it could be affirmatively shown that the parents, or either of them, had at any rate some knowledge of such practice; only in which case it is possible to see how inference might be drawn that they would be prompted thereby to have the baptismal ceremony performed as soon as possible after the date of birth. Wanting such proof of knowledge, any inference would be the veriest guesswork, unsupported by precedent and condemned by the rules of evidence. The argument made and the authorities cited on point No. II of this petition referring to the refusal of the court to instruct the jury not to conjecture or guess at the age of the defendant from this testimony are referred to as being equally applicable here.

Error in Admitting Testimony as to Date of Baptism. Comments on Whitcher v. McLaughlin.

It is the contention of plaintiff in error that not only was Father Harnett's testimony as to the doctrine of the Catholic church inadmissible, but that error was also committed in permitting this witness to testify as to the *date of baptism* of plaintiff in error.

The Government contends this evidence was properly introduced, and cites as authority (brief of defendant in error, p. 7) the case of

Whitcher v. McLaughlin, 115 Mass. 167.

No other case is cited by the Government in support of its contention.

Whitcher v. McLaughlin was an action on an account, in which the defendant pleaded infancy. In support of his plea, the defendant at the trial was permitted to put in evidence the entry of his baptism to prove he was not of age. The entry was identified by the parish priest. Error in admitting this testimony was one of the points complained of by plaintiff, and in discussing the same, the court said:

> "The plaintiff contends that it (the entry in the baptismal registry) was not admissible to prove the time of the defendant's birth. But *assuming this to be so,* the exception cannot be maintained unless it affirmatively appears that the evidence was improperly used for that purpose. The date of the baptism, *with the aid of other evidence tending to fix the defendant's age at the time,* would become material, and the entry was competent to prove that date. We must presume that such evidence was in the case. The bill of exceptions shows that the entry was offered in evidence 'among other things'."

It will thus be seen that the determination of Whitcher v. McLaughlin is not in conflict with any of the cases cited by plaintiff in error in his brief (brief of plaintiff in error, pp. 54 to 61); that on the contrary the court in this case assumed that the evidence of the entry in the baptismal registry was not competent to prove the time of defendant's birth. The holding of this case, as we read it, is that, *provided there is other evidence to fix defendant's age at the time of baptism,*

the baptismal entry would then become competent *to prove the date of baptism.*

The difference between the Whitcher case and this case is that in the former there was other evidence fixing defendant's age at the time of baptism, and the baptismal registry was received merely as ancillary to such other evidence. In this case there is no other evidence showing the defendant's age at the time of baptism, and the baptismal entry was used for the express purpose of showing such age. This, even under the doctrine of the Whitcher v. McLaughlin case, cannot be done.

For the reasons herein given, we respectfully pray that plaintiff in error be granted a rehearing herein.

We append herewith copy of the court's opinion and certificate of counsel that this application is, in his judgment, well founded and is not interposed for delay.

ISIDORE B. DOCKWEILER,
DOCKWEILER & MOTT,
Attorneys for Plaintiff in Error.

G. C. O'CONNELL,
Of Counsel.

APPENDIX.

United States Circuit Court of Appeals for the Ninth Circuit.

Edward H. Phelan, plaintiff in error, v. The United States of America, defendant in error. No. 3086.

Opinion U. S. Circuit Court of Appeals.

Upon writ of error to the United States District Court, for the Southern District of California, Southern Division.

Before Gilbert, Ross and Morrow, circuit judges.

Ross, *Circuit Judge:*

We see no merit in any of the contentions on behalf of the plaintiff in error. The indictment against him charged, among other things, that on the 5th day of June, 1917, he was over 21 years of age and had not then attained the age of 31 years, and that notwithstanding the fact that the said 5th day of June was the day appointed by proclamation of the president for the purpose, and that the said plaintiff in error did not come within any of the exceptions contained in the Act of Congress in pursuance of which the said proclamation was issued, to-wit, the act approved May 18, 1917, entitled "An act to authorize the president to increase temporarily the military establishment of the United States," the said plaintiff in error wilfully thereunder.

The record shows that the sole defense interposed by the plaintiff in error in the court below was based upon the contention that he was born March 13, 1886, and was therefore more than 31 years old on the 5th day of June, 1917.

The proof on the part of the Government given on the trial tended to show that he was in fact born July 13th, 1886, and was therefore not 31 years old June 5th, 1917.

The jury found that issue in favor of the Government, and accordingly returned a verdict of guilty, upon which verdict judgment was duly entered.

The testimony of the plaintiff in error, as well as that of his mother given on the trial, was to the effect that he was born March 13th, 1886; but even in that testimony both of them admitted that up to within about four years of the time of the trial the plaintiff in error was under the "impression" that his birthday was July 13th, 1886.

The Government offered, and there was admitted in evidence over the objection of the defendant, copies duly certified by the commissioner of pensions, of certain applications filed years before the giving of her testimony in the present case by the mother of the plaintiff in error, for a pension as the widow of the father of the plaintiff in error, who was a soldier in the Civil War, in which applications she expressly declared the plaintiff in error was born July 13th, 1886; and the Government also offered, and there was admitted in evidence, also over the objections of the defendant, a petition for a homestead filed by the mother of the plaintiff in error February 9th, 1892, in the Superior Court of Los Angeles county in the matter of the estate of her deceased husband, in which petition she stated, among other things, that at the time of the death of her husband, which occurred June 1, 1889,

that the plaintiff in error was born July 13th, 1886. And there was other testimony given on behalf of the Government of the same tendency—among which was that of Monsignor Harnett, of the Catholic church, who testified in substance that as priest he was called upon to and did baptize the plaintiff in error at the residence of his parents; that by the requirements of his church the priest is obliged to record the date of the baptism of infants, and did so in the instant case—the witness saying:

"I have the baptismal record of the year 1886 with me, and there is recorded in that book the baptismal record of the defendant, Edward Henry Phelan. I baptized the child, and after referring to the record can state the date of the baptism"—giving it as August 8th, 1886.

The witness was further permitted to testify over the objection and exception of the defendant, as follows:

"The teaching of the Catholic church with regard to the death or with regard to the salvation of infants who die without baptism is that no one, no child who is unbaptized and dies before it obtains the use of reason, can enter into the kingdom of heaven."

We think that all of the testimony referred to, to which objection was taken, tended to sustain the contention of the Government that the true date of the birth of the plaintiff in error was July 13th, 1886, and accordingly that the objections were properly overruled.

The objections to the introduction in evidence of the certified copies of the records of the pension bureau are sufficiently answered by the provisions of the statutes of the United States (Fed. Stats. Ann., Vol. 3, Sec. 882, p. 26; Fed. Stats. Ann., Supp. 1914, Secs. 1, 3 and 4, p. 498).

Conceding the impropriety of the remarks of the United States attorney complained of, the error, if any, was, we think, sufficiently cured by the instructions of the court to the effect that the jury should "not consider the remarks of the United States attorney, coming to a conclusion from this evidence. The jury have no right to consider any evidence that was excluded."

The judgment is affirmed.

(Endorsed): Opinion. Filed April 1, 1918. F. D. Monckton, clerk; by Paul P. O'Brien, deputy clerk.

I, Isidore B. Dockweiler, do hereby certify that I am an attorney-at-law, duly licensed to practice in all of the courts of the state of California and in the District Court of the United States for the Southern District of California, Southern Division, and in the United States Circuit Court of Appeals for the Ninth Circuit. That I am a member of the firm of Dockweiler & Mott, and I am one of counsel for Edward H. Phelan, the plaintiff in error in the within and above case. In my judgment the within petition for the rehearing made on behalf of Edward H. Phelan, the plaintiff in error, is well founded, and that such petition is not interposed for delay.

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